OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

VETERANS AFFAIRS MEDICAL CENTER HUNTINGTON, WEST VIRGINIA

Respondent

and Case No. WA-CA-20190

AMERICAN FEDERATION OF

GOVERNMENT EMPLOYEES,

LOCAL 2344, AFL-CIO

Charging Party

Peter A. Niceler, Esquire

For the Respondent

Mr. Carl H. Blevins

For the Charging Party

Christopher M. Feldenzer, Esquire

For the General Counsel

Before: WILLIAM B. DEVANEY

Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R.

§ 2423.1, et seq., concerns two issues: one, whether Respondent violated § 16(a)(1) by a supervisor's statement to a bargaining unit employee; and the other, whether Respondent violated §§ 16(a)(1) and (2) by failing to select the same employee for promotion because he had engaged in protected activity.(2)

This case was initiated by a charge filed on December 17, 1991 (G.C. Exh. 1(a)), which alleged violations of §§ 16(a)(1), (4), and (8) of the Statute; and by an Amended charge filed on March 31, 1992 (G.C. Exh. 1(b)), which alleged violations of §§ 16(a)(1) and (2). The Complaint and Notice of Hearing issued on May 28, 1992 (G.C. Exh. 1(a)), and set the hearing for a date, time and place to be determined later. By Order dated July 9, 1992 (G.C. Exh. 1(e)), the hearing was scheduled for September 24, 1992, in Huntington, West Virginia. By Notice dated September 10, 1992, pursuant to the motion of Respondent, to which the other parties did not object, for good cause shown, it was ordered that the hearing be rescheduled for October 7, 1992, pursuant to which a hearing was duly held on October 7, 1992, in Huntington, West Virginia, before the undersigned. At the conclusion of the hearing, November 9, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to December 9, 1992. Respondent and General Counsel each timely delivered, or transmitted by facsimile, a brief on December 9, 1992, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees, Local 2344, AFL-CIO (hereinafter, "Union") is the exclusive representative of a unit of employees appropriate for collective bargaining at the Veterans Affairs Medical Center, Huntington, West Virginia (hereinafter, "Respondent").

2. On February 4, 1991, James M. Gibson, then work leader (Tr. 106) and Acting Housekeeping Aid Foreman(3), called Mr. Harold Spradling, a WG-2 Housekeeping Aid (Tr. 12), to his office and orally counseled him for sick leave usage (Tr. 16, 109, 110) because he had used more sick leave than he had accumulated in a quarter which Mr. Gibson considered an abuse of sick leave (Tr. 16). Mr. Gibson confirmed the oral counseling by memorandum dated February 4, 1991 (G.C. Exh. 2) and, on February 6, 1991, Mr. Danny Ratliff, Chief Steward, filed a grievance on behalf of Mr. Spradling (G.C. Exh. 3). Mr. Gibson denied the grievance by memorandum dated February 19, 1991 (G.C. Exh. 4); was appealed to the second step by Mr. Ratliff by memorandum dated February 21, 1991 (G.C. Exh. 5); and was sustained by Ms. Nancy M. Jackson, Chief, Building Management Service, on February 27, 1991 (G.C. Exh. 6).

3. Mr. Spradling stated that, ". . . I'd already had went to the Union and Mr. Gibson had stated that -- that I should have come to him instead of going to the Union." (Tr. 23). He also stated that, "I had the documentation there, but he didn't want to see it." (Tr. 23). Mr. Gibson denied that he made any such statement (Tr. 125) and stated that, after the oral counseling, he did not meet privately with Mr. Spradling concerning sick leave usage.(4) I found Mr. Gibson a credible witness; his testimony concerning the oral counseling of Mr. Spradling and two other employees, Earl Porter and Winfred Stubblefield, for perceived sick leave abuse convincing; and his testimony was fully consistent with and supported by the record. On the other hand, I did not find Mr. Spradling's testimony concerning the sick leave incident entirely credible, his testimony was inconsistent and at times contradictory; and was not consistent with or supported by the record. For example, Mr. Spradling stated, ". . . I made an effort to get my doctor statements and dental records. . . ."

(Tr. 23); "Well, I had it with me, yes. Well, at that time, I didn't because I was called in the office and I was unaware why I was being called in there." (Tr. 34); "I had the documentation there, but he didn't want to see it" (Tr. 23); "Well, I told him of these documents. No. I didn't give them to him, because I hadn't violated the contract as to using sick leave." (Tr. 34). Mr. Gibson testified that Mr. Spradling offered no evidence; that neither Mr. Spradling nor Mr. Stubblefield, who, he believed, also grieved his oral counseling, offered any medical certification for the use of sick leave or called any such evidence to his attention (Tr. 111). Mr. Gibson confirmed his oral counseling of Mr. Spradling on February 4, 1991, stating, in part, that,

> "2. Since November 14, 1990, you have used a total of 31 1/4 hours of sick leave.
>
> "3. I feel this usage of sick leave is becoming too frequent and an indication of possible sick leave abuse.
>
> "4. It may be necessary to place you on sick leave restriction if this continues. . . ." (G.C. Exh. 2)

Mr. Spradling was represented by Chief Steward Danny Ratliff who responded on February 6, 1991, and he stated, in part, that,

> "2. Your memorandum dated February 4 . . . is unjustified.
>
> 3. Nowhere have you shown that Mr. Spradling has abused or could be abusing his sick leave.
>
> "4. Most if not all of Mr. Spradling's sick leave was with prior approval. . . ." (G.C. Exh. 3).

Mr. Gibson responded on February 19, 1991, and stated, in part, as follows:

> "1. Reference is hereby made to your letter dated February 6, 1991 . . . and our meeting of February 18, 1991. . .
>
> "2. . . . From November 14, 1990, until February 2, 1991, Mr. Spradling used 31 1/4 hours' sick leave with no medical certification for this period of time. When you are using more sick leave than is being earned, this indicates sick leave abuse.
>
> "3. In reference to paragraph five of your letter, [reference to Art. 17, Sec. 4, A, 1, 2, 3, 4, of the

> Parties' Agreement] as of February 18, 1991, I have no documentation to support anything different than a phone call that employee was sick. . . ." (G.C. Exh. 4)

Mr. Ratliff elevated the grievance to Ms. Nancy Jackson, Chief Building Management Service, on February 21, 1991 (G.C. Exh. 5); but he did not dispute or challenge Mr. Gibson's assertion that, "I have no documentation. . . ."

Accordingly, because I did not find Mr. Spradling's testimony convincing, I do not credit his testimony that he met privately with Mr. Gibson after the oral counseling or that Mr. Gibson made any statement to him to the effect that he should have come to him instead of going to the Union. I do credit Mr. Gibson's testimony that he did not meet privately with Mr. Spradling after the oral counseling and that he made no statement to Mr. Spradling as set forth above.

4. In July 1991, Respondent posted Vacancy Announcement 91-47 for a Housekeeping Aid, WG-3 (Res. Exh. 5). Mr. Spradling was one of eight applicants for the position (two, Jill R. Lewis and Sondra L. Lewis, withdrew) and, although eligible for promotion, Mr. Spradling was not selected. The Promotion Certificate was submitted by Personnel on August 7, 1991, and Mr. Philip E. Childers, Acting Chief, Building Management Services, on August 9, 1991, selected Mr. Bobby L. Leffingwell. Mr. Spradling, and each of the other qualified applicants, was notified by Personnel by memorandum dated August 14, 1991, that he was qualified and referred for consideration, but not selected; and that Mr. Leffingwell had been selected (Res. Exh. 5). However, Mr. Spradling had learned of his non-selection before the official notification by Personnel and had contacted Mr. Carl Blevins, President of the Union, to discuss his non-selection.(5) He told Mr. Blevins that he, Spradling, was the best person, because the "guy" they selected "don't know how to operate the equipment."(6) (Tr. 48-49). Mr. Blevins called Mr. Gibson and told him that Mr. Spradling was dissatisfied and wanted to know why he hadn't been selected and asked Mr. Gibson if he would mind answering the questions provided for by the Agreement for Mr. Spradling; that Mr. Gibson said he would; and he answered in writing (Tr. 49) by memorandum dated August 13, 1991 (G.C. Exh. 7), in which he stated, in part, that,

> "I feel with the information that was furnished and in my best judgement, I selected(7) the best qualified candidate for the position."
>
> 3. I regret that there was only one position to be filled; however, Mr. Spradling will be considered for any positions in the future for which he qualifies." (G.C. Exh. 7).

After receipt of Mr. Gibson's memorandum, Mr. Blevins again talked to Mr. Spradling who wasn't satisfied and said, ". . . he had been discriminated against . . . he felt like he should have got the job." (Tr. 51-52). So, Mr. Blevins set up a meeting with Mr. Gibson which was held on September 9, 1991 (Res. Exh. 6). Present at this meeting were Mr. Gibson and Mr. Childers for Respondent; Mr. Blevins and Mr. Spradling for the Union. Mr. Spradling testified that at that meeting Mr. Gibson told him,

"Well, he said I shouldn't have went to the Union, I should have come to him first." (Tr. 28).

Mr. Blevins testified that,

". . . Mike [Gibson] told him, he said, you know, 'You should have come to me instead of going to the Union." (Tr. 54).

Mr. Gibson conceded that he told Mr. Spradling, "'Harold, if you had a problem with this,' I said, 'why didn't you stop me in the hallway or come to my office and talk to me about it.'" (Tr. 112); but he insisted that he never made any statement that Mr. Spradling should see him before going to the Union (Tr. 115). Although naive, Mr. Gibson impressed me as a truthful witness; nevertheless, in context, his words would have meant precisely as Messrs. Spradling and Blevins understood his comment to mean, namely, that he said words to the effect that Mr. Spradling should have come to him first before going to the Union and I so find.

5. Mr. Spradling was so dissatisfied that Mr. Blevins set up a meeting with Ms. Jackson near the end of September (Tr. 55). Present at this meeting were: Ms. Jackson and Mr. Gibson for Respondent and Mr. Blevins and Mr. Spradling for the Union. Ms. Jackson testified that Mr. Gibson had not been the selecting official for the WG-3 position, that the Chief of the Service was the selecting official (Tr. 71), which ordinarily would have meant her, but because she was out of town and had designated Mr. Childers as Acting Chief, Mr. Childers made the selection (Tr. 71, 72); that after there was some conversation with Mr. Spradling and the Union about the selection she had personally reviewed the file and had found no irregularity (Tr. 72). Indeed, she stated that based on the information she would have made the same selection (Tr. 73). She further stated that Mr. Leffingwell had received the highest score of 21.5 by the Promotion Panel while Mr. Spradling was second with a score of 19.5 (Tr. 86); and that, while a selector might not be precluded from selecting the highest ranked person, she had never known anyone who would not want to select the best qualified person, ". . . that is the purpose for the promotion panel, is for them to rate and rank the individuals. . . ." (Tr. 91). She stated that she had never heard Mr. Gibson make any comment that he would rather they come to him rather than go to the Union, and that, "Mr. Gibson is always very employee oriented plus he would never make a statement to the effect that employees should not go the Union" (Tr. 89). She further said she had never made any such statement and was not aware of Mr. Childers ever having made any such statement (Tr. 89); nor had she ever heard Mr. Gibson express any Union animus against Mr. Spradling or say anything derogatory about the Union (Tr. 89).

Mr. Blevins testified that Mr. Spradling had asked Ms. Jackson why he wasn't selected and told her, "This guy that you selected, I have to train him in the things he can't do that he's supposed to do as a 3" (Tr. 55) to which Ms. Jackson had responded, "Well, you know, he doesn't have to do this polishing or waxing. He didn't have to know how to do that to be a 3." (Tr. 55-56); but then she changed her position, because it was in the position description, and said that "you've got a poor attitude in your conduct, your conduct and attitude" (Tr. 56) and when Mr. Spradling had said "Show me", she referred to a Report of Contact (Tr. 56). Mr. Blevins said that after looking at the Report of Contact, ". . . it didn't look good." (Tr. 57). Whether the subject of the Report of Contact was, as initially reported, or muted as Mr. Spradling asserted, it had no bearing whatever on the selection for the reason that it did not occur until more than a month after the selection had been made, i.e. the selection of Mr. Leffingwell had been made on August 9, 1991, and this incident occurred on September 16, 1991 (Res. Exh. 1). As the incident occurred shortly before the meeting (near the end of September (Tr.

55)) the Report undoubtedly would have been at or near the top of Mr. Spradling's file so it is understandable that Ms. Jackson made reference to it. At that time, Mr. Spradling had not made any response (dated 10/2/91) and Ms. Crutcher had not filed her Report of Contact (10/16/92) in which she evaluated Mr. Spradling's to be more accurate (Res. Exh. 1). Mr. Blevins stated that Ms. Jackson also stated. ". . . that Mr. Gibson made his selection. He had a lot of candidates to select from and he picked the candidate he thought was best." (Tr. 55). Ms. Jackson had made clear that the selecting official had been Mr. Childers, not Mr. Gibson (Tr. 72, 83, 85).

6. As noted previously, Mr. Gibson, who made the Supervisory Appraisal of Mr. Leffingwell, noted that,

> "Mr. Leffingwell has been assigned to 3 West most his time at the VA and . . . has not had the training on some of the new equipment that some of the other employees have had. . . ." (Res. Exh. 5).

In rating the candidates, the Promotion Panel obviously took note of this because each downgraded Mr. Leffingwell on Element/Factor III; but, in other respects, it is clear that Mr. Leffingwell had been rated a bit better than Mr. Spradling. For example, Mr. Leffingwell had received a rating for the April 1, 1990, to March 31, 1991, period of "Highly Successful" indeed, had been rated "Exceptional" on three elements and "Fully Satisfactory" on the other three elements (Res. Exh. 4b); while Mr. Spradling for the same period was rated "Fully Successful", and had never received an "Exceptional" rating (Res. Exh. 3b); Mr. Leffingwell had received a special contribution award, while Mr. Spradling had not; etc. In addition, Mr. Leffingwell had been promoted to WG-2 slightly before Mr. Spradling (L. 2/11/90); S. 3/26/90). In short, there were myriad reasonable, rational, objective and demonstrable reasons, including, but certainly not limited to, the few random examples set forth above, for the ratings of Messrs. Leffingwell and Spradling by the Promotion Panel (Tr. 138-139). Accordingly, while Mr. Leffingwell was deficient in training on some equipment, he surpassed Mr. Spradling on other elements and, overall, rated higher (21.5) than Mr. Spradling (19.5) (Res. Exh. 5).

Mr. Childers was not Acting Chief when he served on the Promotion Panel (Tr. 103, 133) and did not know when he was on the Panel that he would be Acting Chief for selection purposes (Tr. 103, 122). Mr. Childers knew Mr. Spradling but had never worked with him (Tr. 134); he knew Mr. Leffingwell and had worked with him (Tr. 133, 134). When he received the certification list, he went into Ms. Jackson's office and looked at it and called Mr. Gibson and told him the certification for the WG-3 job was there, gave Mr. Gibson the packet and asked him to look it over and tell him what he thought. Mr. Childers told Mr. Gibson "I'd probably pick Bobby Leffingwell for the job." (Tr. 136-137) (Mr. Gibson testified to like effect. (Tr. 107)). After going over the material, Mr. Gibson came back and gave his recommendation for Mr. Leffingwell (Tr. 107, 137). Mr. Childers further stated that had not his choice and Mr. Gibson's recommendation coincided he, as a management trainee only temporarily assigned to Respondent, would have deferred decision until Ms. Jackson returned (Tr. 137-138).

Conclusions

1. Statement to Spradling

For reasons fully set forth above, I have found that on September 9, 1991, Mr. Gibson stated words to the effect that Mr. Spradling should have come to him first before going to the Union. I agree with General Counsel that, "When Spradling is told in his meeting with supervisor Gibson and Union President Blevins that he should not have gone to the Union and should have come to Gibson first, the implication is crystal clear. That is, Gibson implies that things would go smoother for Spradling if he brought his problems to Gibson instead of the Union. . . ." (General Counsel's Brief, pp. 6-7). I conclude that Mr. Gibson expressed himself in a way that violated § 16(a)(1) of the Statute. Navy Resale System, Field Support Office, Commissary Store System, 5 FLRA 311, 316 (1981); United States Customs Service, Pacific Region, 47 FLRA No. 38, 47 FLRA 459 (1993); U.S. Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857, Case No. 9-CA-80015, 81 Adm. Law Judges Dec. Report, May 16, 1989.

2. Failure to select Spradling

A. No showing that protected activity was a motivating factor

General Counsel has failed to make a prima facie showing that Mr. Spradling's engagement in protected activity, specifically his having filed a grievance over his oral counseling for sick leave abuse, was a motivating factor in his non-selection for a bid position. To the contrary, the record affirmatively and overwhelmingly shows that: (a) Following his filing of the grievance, Mr. Gibson's appraisal of Mr. Spradling 4/1/90 - 3/31/91 (Res. Exh. 3a) shows no departure whatever from Mr. Spradling's prior appraisals, including the 10/29/90 Progress Review by Spradling's former supervisor Robert Ratan; (b) While Mr. Spradling stated that after his sick leave grievance his relationship with Mr. Gibson was ". . . somewhat different because, when he would assign me work, usually he would go into detail, he would put me maybe with somebody if the work required at least two people. Afterward, he was sort of blunt. He would assign me to different areas, mostly keeping me away from the other personnel." (Tr. 24) [Mr. Gibson denied that he harbored any ill feelings towards Mr. Spradling for filing the grievance and stated, "It's his right." (Tr. 111)], his statement constitutes no probative evidence of disparate treatment, moreover, the record shows that from at least April 1, 1991, Mr. Spradling has been under the direct supervision of another person (Res. Exhs. 3a, 5; Tr. 13, 134); (c) Mr. Gibson was not the selecting official - Mr. Philip Childers was[8] and there is no contention that Mr. Childers harbored any Union animus. To the contrary, Mr. Blevins said of Mr. Childers, "I knew him real well and we worked good together." (Tr. 53); and (d) the statement, which I have found Mr. Gibson made on September 9, 1991, in violation of § 16(a)(1), was not made until well after the selection of Mr. Leffingwell. This is the only credible evidence of interference with protected rights by Mr. Gibson; it occurred after the selection of Mr. Leffingwell; and the statement was made only in connection with Mr. Spradling's dissatisfaction with his non-selection. Accordingly, Mr. Gibson's recommendation of Mr. Leffingwell, which concurred with Mr. Childers' selection, was not because Mr. Spradling had engaged in protected activity; and (e) although the record shows that Mr. Spradling had been a steward since about April 1991 (Tr. 13), there is no contention and no evidence that Mr. Spradling's protected activity as a steward was a consideration. The only references to Mr. Spradling's union activity were the following questions and answers in the direct examination of Mr. Gibson and of Mr. Childers:

[Gibson]

"Q. All right. What, if any effect did Mr. Spradling's union activity have on your recommendation?

"A. None at all.

"Q. Did you consider it at all?

"A. No." (Tr. 109).

[Childers]

Q. Was there ever any discussion about Mr. Spradling's union activity?

"A. Not that I can recall. You mean during the meeting?

"Q. During or immediately after.

"A. I don't recall anything like that. When we broke up, it was, you know -- like I said, it was -- we shook hands and it was kind of a congenial thing. . . ."

. .

"Q. Going back to the selection, did your selection of Mr. Leffingwell over Mr. Spradling have anything to do with Mr. Spradling's union activity?

"A. No, sir. It did not." (Tr. 141-142).

Accordingly, because General Counsel has failed to make the required prima facie showing that Mr. Spradling's engagement in protected activity was a motivating factor in his non-selection for the WG-3 bid position, the violations alleged in paragraphs 10, 11 and 13 of the Complaint must be dismissed. Letterkenny Army Depot, 35 FLRA 113, 118 (1990) (hereinafter, "Letterkenny"); U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Service Center, Ogden, Utah, 41 FLRA 1212 (1991).

B. If protected activity were a motivating factor, the preponderance of the evidence shows: (1) a legitimate justification for the selection of Leffingwell over Spradling; and (2) that the same action would have been taken in the absence of protected activity.

The Promotion Panel ranked Leffingwell first, with a score of 21.5, Spradling second, with a score of 19.5, and the four other qualified applicants (two applicants had withdrawn and were not rated) ranked lower, with scores of 18.5 (two), 17 and 13.5 (Res. Exh. 5). Each member of the Panel rated Leffingwell ahead of Spradling.

Mr. Childers had been a member of the Promotion Panel, at which time he was not Acting Chief. When the Promotion Certificate for the WG-3 Housekeeping Aid position was received, Mr. Childers was, as it turned out, the Acting Chief of Building Management Services because Ms. Jackson was out of town. As the selecting official, Mr. Childers selected Mr. Leffingwell because the Panel, of which he had been a member, had rated him best qualified, and told Mr. Gibson that his choice was Leffingwell but asked Mr. Gibson to review the packet and give him his recommendation. Mr. Gibson, after reviewing the packet, recommended Mr. Leffingwell for a variety of reasons, as he responded on cross-examination, including the fact that Leffingwell, "out-qualified Mr. Spradling" (Tr. 130); that he, Gibson, knew that, ". . . Mr. Leffingwell's performance appraisal was higher than Mr. Spradling's" (Tr. 131); and ". . . from supervising the two employees, I knew that Bobby was a more -- what I would consider a more conscientious employee and had a lot -- and had some -- quite a bit of infection control training." (Tr. 131). Because Mr. Gibson's recommendation coincided with his choice, Mr. Childers selected Mr. Leffingwell for the position effective August 25, 1991 (Res. Exh. 5).

Ms. Jackson testified that the consistent practice was to select the best qualified person, that, ". . . that is the purpose for the promotion panel, is for them to rate and rank the individuals. . . ." (Tr. 91). She further testified that, after Mr. Spradling raised a question as to why he had not been selected, she independently reviewed the file and based on the information would have made the same selection (Tr. 73).

Accordingly, even if, contrary to my finding that General Counsel did not make a prima facie showing that Mr. Spradling's protected activity was a motivating factor in his non-selection, it were deemed that engagement in protected activity was a motivating factor, nevertheless, the preponderance of the evidence shows that Respondent had legitimate justification for its selection of Mr. Leffingwell over Mr. Spradling and that Respondent would have made the same selection in the absence of protected activity. Letterkenny, supra, at 118, 119, 123. Accordingly, for these reasons as well, the violations alleged in paragraphs 10, 11 and 13 of the Complaint must be dismissed.

Having found that Respondent violated § 16(a)(1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of Regulations, 5 C.F.R. 2423.29, it is hereby ordered that the Veterans Affairs Medical Center, Huntington, West Virginia, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing Mr. Harold L. Spradling, or any other bargaining unit employee, by making statements indicating that he, or they, should come to management instead of going to the Union.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its facilities at the Veterans Affairs Medical Center, Huntington, West Virginia, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Administrator, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, 1255 22nd Street, NW, Washington, DC 20037, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is FURTHER ORDERED, pursuant to § 18(a)(8) of the Statute, 5 U.S.C. § 7118(a)(8), that paragraphs 10, 11 and 13 of the Complaint, alleging violations of §§ 16(a)(1) and (2) of the Statute, 5 U.S.C. §§ 7116(a)(1) and (2), be, and the same are hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: October 15, 1993

Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce Mr. Harold L. Spradling, or any other bargaining unit employee, by making statements indicating that he, or they, should come to management instead of going to the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____

(Activity)

Date: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Region, whose address is: 1255 22nd Street, NW, Suite 400, Washington, DC 20037, and whose telephone number is: (202) 653-8500.

Dated: October 15, 1993

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of

the initial "71" of the statutory reference, i.e.,

Section 7116(a)(5) will be referred to, simply, as, "16(a)(5)".

2. Respondent asserts that,

". . . The incident that gave rise to the Section 7116(a)(2) alleged violation, occurred in August 1991, when Mr. Childers selected Bobby Leffingwell . . . and not Harold Spradling . . . The Section 7116(a) (2) charge was not made until March 31, 1991 . . ., more than six months after the incident passed before the Section 7116(a)(2) charge was made. The Authority should therefore dismiss this allegation as being untimely." (Respondent's

Brief, p. 1).

Respondent raised the same argument at the hearing (Tr. 10). I shall treat the argument as a motion to dismiss the § 16(a)(2) allegation pursuant to § 18(a)(4)(A) of the Statute which provides, in part, that,

" . . . no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority."

Respondent's motion to dismiss the § 16(a)(2) allegation is denied. The allegations in the original charge (G.C. Exh. 1(a)), set forth as the Basis of the Charge, are identical to the allegations in the amended charge (G.C. Exh. 1(b)). The only difference is that the original charge asserted that Respondent had violated §§ 16(a)(1), (4) and (8); whereas, the amended charge asserts that Respondent violated §§ 16(a)(1) and (2). The cause of action, as material, was discrimination, because of protected activity, in promoting a lesser qualified employee. In the original charge this alleged discrimination was asserted to have violated, inter alia, 16(a)(1); and in the amended charge was asserted to have violated 16(a)(1) and (2); but the addition of the asserted 16(a)(2) violation, unlike Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749 (4th Cir. 1949) where a different cause of action was added in an amended charge, did not change the cause of action, i.e., the alleged unfair labor practice, namely, alleged discrimination in promoting a lesser qualified employee. Accordingly, addition of the allegation that

§ 16(a)(2) was violated as well as 16(a)(1) is not barred by

§ 18(a)(4)(A) of the Statute. Department of the Interior, U.S. Geological Services, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543, 551-560 (1982); United States Department of Veterans Affairs, Washington, D.C., Veterans Administration Medical Center, Amarillo, Texas, 42 FLRA 333, 339-340 (1991); Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Illinois, 44 FLRA 117, 123-124 (1992). Further indicative of a single cause of action is

the fact that the remedy for discrimination in promoting would be the same under § 16(a)(1).

3. Mr. Gibson was made Housekeeping Aid Foreman about April 1992 (Tr. 118).

4. Mr. Gibson confused the February 1991, sick leave matter and the September 1991, meetings when he made the statement that he believed he met with Mr. Spradling and Mr. Blevins "on that one", i.e., sick leave (Tr. 124); but except for this momentary confusion, the record is both clear and consistent that Mr. Gibson disavowed any meeting with Mr. Spradling after the oral counseling (Tr. 110, 125-126, 128).

5. Mr. Spradling testified that he first contacted Mr. Gibson (Tr. 25); but if he did, Mr. Blevins' testimony does not indicate that Mr. Spradling told him he had spoken to Mr. Gibson; and Mr. Gibson denied that he had any such meeting with Mr. Spradling (Tr. 124).

6. Mr. Gibson, who made the Supervisory Appraisal of Mr. Leffingwell, had duly noted that,

"Mr. Leffingwell has been assigned to 3 West most of his time at the VA and . . . has not had the training on some of the new equipment that some of the other employees have had. I feel confident with minimal training Mr. Leffingwell will have no problem with any of this equipment." (Res. Exh. 5).

7. Mr. Gibson was not, as noted earlier, the selecting official (Res. Exh. 5; Tr. 71, 72, 133). Mr. Gibson was not given authority to select until April - June 1992, and he stated, ". . . It was just a bad selection of words, I guess. I should have said that I recommended the best qualified person." (Tr. 127).

8. General Counsel's assertion that the record does not support the conclusion that Mr. Childers was the selecting official (General Counsel's Brief, p. 12), is not correct. The record shows wholly without contradiction that Mr. Childers, not Mr. Gibson, was the selecting official. First, the Promotion Certificate shows that the August 9, 1991, selection of Mr. Leffingwell was by Mr. Childers, Acting Chief, BMS (Res. Exh. 5). Second, the unchallenged testimony of Ms. Jackson and Messrs. Gibson and Childers firmly shows that Mr. Childers was the Acting Chief, in the absence of Ms. Jackson, and that he was the selecting official for the WG-3 vacancy.